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Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners,

v.

KIRK COLE, COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* BUSINESS LEADERS IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are individual business leaders and academics who oppose Texas House Bill 2 ("H.B. 2") (codified at Tex. Health & Safety Cod. Ann. §§ 171.0031, 245.010). These individuals have the experience and knowledge to understand how H.B. 2 negatively impacts businesses and the national economy. *Amici curiae* oppose H.B. 2 because it unduly burdens working women's ability to obtain an abortion, a critical component of a woman's ability to time entry into parenthood and best serve her own economic and professional interests as well as those of the businesses in which she works. *Amici curiae* offer this brief to assist the Court in understanding the negative economic impact of statutes like H.B. 2 that restrict access to abortion providers.

Amici curiae are comprised of 60 individual business leaders, including current and former Fortune 200 and technology industry executives, corporate directors, owners of small businesses as well as those who have managed entire business units and/or employee divisions. *Amici curiae* also include academics who have studied and understand the economic realities businesses and women in business must face. Their descriptions are set forth in further detail in the Appendix, attached hereto.[2]

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1. Pursuant to Supreme Court rule 37.6, counsel for *amici* represents that it authored this brief in it entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have consented to the filing of this brief.

2. All *amici* identified are participating in this brief in their individual capacity and not as representatives of any corporation, business, organization or institution with which they are affiliated.

SUMMARY OF ARGUMENT

"The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856, 112 S. Ct. 2791, 2809 (1992) (citation omitted).

Working women are essential drivers of the United States economy. It is critical to the continued success of the national economy that women have the ability to participate fully in the businesses that employ them. In order to do so, they must have meaningful access to the full spectrum of reproductive healthcare options so that they may choose whether and when to have children. Pregnant women who decide not to have or to postpone having children have a constitutionally protected fundamental right to abortion. By severely restricting access to abortions, H.B. 2 unduly burdens Texas women who choose to exercise their right to terminate a pregnancy and undeniably alters their professional options as well as their ability to perform their jobs at their full potential. For businesses, statutes that restrict access to abortion services can result in stressed and distracted employees, absenteeism, greater turnover and overall decreased productivity, all of which are detrimental to those businesses and, ultimately, the national economy. At the same time, businesses and the national economy benefit when working women have meaningful access to reproductive healthcare, so they can choose whether and when to have children and can best manage their work and life responsibilities. As one experienced business leader aptly explained: "We can't return to a time when working women have to second-guess whether they can fulfill their responsibilities—to

their jobs or to their families—because of an unplanned pregnancy. Women who support their families need safe, reliable access to reproductive health services."[3] H.B. 2 represents a step backwards both for women who seek to pursue a career during their childbearing years and for the millions of companies and businesses that rely upon them.

For these and the reasons set forth more fully below, *amici curiae* urge this Court to overturn the Fifth Circuit Court of Appeal's June 9, 2015 opinion and find the challenged provisions in H.B. 2 to be an unconstitutional undue burden on the fundamental rights of women.

ARGUMENT

Women's pursuit of their educational and professional goals is intrinsically tied to their ability to determine whether and when to have children. Since *Roe v. Wade* recognized abortion to be a constitutionally protected fundamental right, 410 U.S. 113, 93 S. Ct. 705 (1973), the number of working women has grown considerably and women have increasingly advanced into senior business roles.

The increased number of women in the workforce has added $1.7 trillion gross domestic product to the national economy.[4] Women-owned small businesses have an annual

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3. Alexandra Loeb, former corporate Vice President of Microsoft Corporation.

4. Eileen Appelbaum *et al.*, Center for American Progress and the Center for Economic and Policy Research, *The Economic Importance of Women's Rising Hours of Work: Time*

economic impact of $2.8 trillion.[5] A critical predicate for that economic growth has been women's ability to control the timing of childbearing through access to the full spectrum of reproductive healthcare services, including abortion. The restrictions imposed by H.B. 2 and similar statutes threaten to reverse decades of economic gains by severely reducing access to abortion services through regulations that do not further women's health.

I. Women's Ability To Determine Whether And When To Have Children Has Allowed Them To Play An Increasingly Critical Role In Driving The National Economy.

Women have made significant educational and professional advancements because they are able to decide whether and when to have children.[6] Whether terminating

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to Update Employment Standards 1 (Apr. 2014), *available at* https://cdn.americanprogress.org/wp-content/uploads/2014/04/WomensRisingWorkv2.pdf ("Appelbaum").

5. Center for Women's Business Research, *The Economic Impact of Women-Owned Businesses In the United States* 1, 10 (Oct. 2009), *available at* https://www.nwbc.gov/sites/default/files/economicimpactstu.pdf (explaining that "women-owned firms are not a small, niche market but are a major contributor and player in the overall economy") ("CWBR, *Economic Impact*").

6. Adam Sonfield *et al.*, Guttmacher Inst., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children* (Mar. 2013), *available at* https://www.guttmacher.org/pubs/social-economic-benefits.pdf (summarizing and synthesizing studies on the social and economic benefits of women's ability to plan whether and when to have children through the use of contraception) ("Sonfield"); Nat'l Women's Law Center, *Fact Sheet: Reproductive Health is Part of the Economic Health*

an unplanned pregnancy or preventing one through the use of contraceptives, there can be no question that women's ability to make these decisions has had a profound effect on their and the country's economic well-being.[7] The "weight of the evidence across numerous studies shows significant employment and educational gains have followed directly from women's ability to better time their entry into parenthood. ."[8]

A. Women Have Unique Healthcare Needs That Must Be Met For Them To Participate Fully in The Workforce.

For women to participate in and continue to enhance the national economy, their specific healthcare needs, including meaningful access to the full range of

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of Women and Their Families (May 2015), *available at* http://nwlc.org/wpcontent/uploads/2015/08/reproductive_health_is_part_of_the_economic_health_of_women_5.29.15pdf ("NWLC, *Reproductive Health*").

7. Sonfield, *supra* note 6, at 29 (finding that "[p]lanning, delaying and spacing one's children generally appear to help women achieve their career goals").

8. Kelleen Kaye *et al.*, The National Campaign to Prevent Teen and Unplanned Pregnancy, *The Benefits of Birth Control in America: Getting the Facts Straight* 29 (2014), *available at* https://thenationalcampaign.org/sites/default/files/resource-primary-download/getting-the-facts-straight-final.pdf ("Kaye"); *see also* Martha J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, Quarterly J. of Econ. 289, 318 (Feb. 2006) (discussing how "greater fertility control contributed to the boom in young women's market work from 1970 to 1990").

reproductive healthcare services, must be met.[9] Overall, "[w]omen utilize more medical services than men due in part to longer life expectancies, the need for reproductive care, and a greater likelihood of chronic disease and disability."[10] Eight-six percent of women reported seeing a healthcare provider at least once a year.[11] The disparity between men and women's use of reproductive health services is particularly pronounced. According to one study, 78.8 percent of sexually active females aged 15 to 44 received reproductive health services in the past year, compared to only 14.9 percent of similarly situated males.[12]

Pregnancy also gives rise to important and specific healthcare needs. Annually, 6.6 million American

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9. *See* Brief for the Institute for Women's Policy Research, National Association of Social Workers, Texas Chapter of National Association of Social Workers, and Re: Gender as *Amici Curiae* in Support of Petitioners, *Whole Woman's Health, et al. v. Kirk Cole, M.D.*, No. 15-724 (discussing how Texas insufficiently funds non-abortion women's health services).

10. The Henry J. Kaiser Family Foundation, *Ensuring the Health Care Needs of Women: A Checklist for Health Exchanges* 1, 4 (Feb. 2013), *available at* https://kaiserfamilyfoundation.files.wordpress.com/2013/04/8410.pdf (stating that 35 percent of women have at least one chronic condition requiring regular medical treatment).

11. The Henry J. Kaiser Family Foundation, *Women's Health Care Chartbook: Key Findings from the Kaiser Women's Health Survey* 17 (May 2011), *available at* https://kaiserfamilyfoundation.files.wordpress.com/2013/01/8164.pdf ("*Women's Health Care Chartbook*").

12. Office of Population Affairs, *Reproductive Health and Healthy People 2020* 10 (Dec. 2010), available at http://www.hhs.gov/opa/pdfs/reproductive-health-and-healthy-people-2020.pdf ("OPA, *Healthy People 2020*").

women become pregnant.[13] Approximately 3.4 million, or approximately half, of those pregnancies are unintended.[14] Between 10 and 20 percent of pregnancies end in miscarriage,[15] while an additional 21 percent of pregnancies end in abortion.[16] Unintended pregnancies are not prevented by the use of contraception in all cases. Contraceptives are not infallible. Of the women who use a reversible method of contraception (*e.g.*, condoms, intrauterine devices, birth control pills), 12.4 percent still become pregnant every year.[17] Women, therefore, need access to both contraceptives *and* abortions to effectively control whether and when they have children. It is not enough merely to rely upon reversible methods of contraception.

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13. Guttmacher Inst., *Fact Sheet: Unintended Pregnancy in the United States* 1 (July 2015), *available at* http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.pdf ("Guttmacher, *Unintended Pregnancy*").

14. *Id.*

15. Mayo Clinic, *Diseases and Conditions: Miscarriage*, *available at* http://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/basics/definition/con-20033827 (explaining that "the actual number is probably much higher because many miscarriages occur so early in pregnancy that a woman doesn't even know she is pregnant").

16. Guttmacher Inst., *Facts on Induced Abortion in the United States* 1 (July 2014), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.pdf ("Guttmacher, *Induced Abortion*"); *see also* Guttmacher, *Unintended Pregnancy* at 3 (finding that 40 percent of unintended pregnancies end in abortion).

17. OPA, *Healthy People 2020* at 8.

By the age of 45, more than half of American women will have had an unintended pregnancy.[18] Thirty percent of all American women will terminate at least one pregnancy by abortion.[19] More than 60 percent of women who obtain an abortion are already mothers,[20] and many of these women are the primary breadwinners of their families.[21] Further, "[a] woman who needs an abortion but can't get one is three times more likely to fall into poverty than a woman who is able to end her pregnancy."[22] Abortions, therefore, are often sought by women to further their families' as well as their own well-beings.

Nearly 53 million legal abortions were performed between 1973 and 2011.[23] Given the number of legal

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18. Guttmacher, *Unintended Pregnancy* at 1.

19. *Id.*

20. Guttmacher, *Induced Abortion* at 1.

21. Wendy Wang *et al.*, Pew Research Social & Demographic Trends, *Breadwinner Moms: Mothers Are the Sole or Primary Provider in Four-in-Ten Households with Children; Public Conflicted about Growing Trend* 1 (May 29, 2013), *available at* http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf ("Wang"); *see also* Liz Watson *et al.*, Nat'l Women's Law Center, *Fact Sheet: Collateral Damage: Scheduling Challenges for Workers in Low-Wage Jobs and Their Consequences* 1 (June 2015), *available at* http://nwlc.org/wp-content/uploads/2015/08/collateral_damage_fact_sheet_june_2015.pdf. (stating that of those women serving as breadwinners of their families, nearly two-thirds are single mothers).

22. Sarita Gupta, *Abortion Should Be a Right for Working Women - Not a Privilege*, TIME (Sept. 22, 2015), *available at* http://time.com/4034008/women-reproductive-health-care-options/ ("Gupta").

23. Guttmacher, *Induced Abortion* at 1.

abortions performed on American women, and the fact that 30 percent of American women have had or will have an abortion, it is clear that this procedure is a critical element of women's healthcare needs and their ability to manage life decisions, including their professional aspirations and careers. As this Court recently recognized, "fundamental liberties . extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-98 (2015). Few choices define a woman's personal identity and beliefs more than her decision of whether and when she wants to bear a child.

B. Women With Access To Safe And Legal Abortions Have Made Significant Strides In Their Own Careers And Strengthened The National Economy.

"'No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. .'" *Orr v. Orr*, 440 U.S. 268, 280, 99 S. Ct. 1102, 1112 (1979) (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15, 95 S. Ct. 1373, 1378 (1975)). Women with access to contraceptives and abortions have made great strides in the marketplace and the world of ideas, and at least as to obtaining college and postgraduate degrees have even surpassed their male counterparts.

The ability to time pregnancy assists women at all stages of their career paths, beginning with the bedrock of education. Women who delay having children to complete their educations are more likely to go on to earn additional higher degrees that better enable them to participate fully

and advance in the workforce.[24] Likewise, the legalization of abortion had a statistically significant impact on the number of women in professional occupations.[25] Indeed, "[a]ccess to the pill was linked to the increased numbers of college-educated women pursuing advanced professional degrees and making up increased proportions of such degree programs."[26] Today, women earn the majority of college and postgraduate degrees: 62 percent of associate's degrees, 57 percent of bachelor's degrees, 60 percent of master's degrees and just over half of all Ph.D.s.[27]

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24. Sonfield, *supra* note 6, at 9 (finding that "women who experience teen births complete approximately two fewer years of formal schooling as compared with women who wait to have children until age 30 or older").

25. Claudia Goldin & Lawrence F. Katz, *The Power of the Pill: Oral Contraceptives and Women's Career and Marriage Decisions*, 110(4) J. Pol. Econ. 730, 762 (2002).

26. While the majority of the literature focuses on contraception, "it should be noted that [the] findings support expanded access to abortion in addition to contraception . The reasons women give for having an abortion are quite similar to those they give for using contraception; for example, three-quarters of women seeking an abortion say that having a baby would interfere with work, school or the ability to care for dependents. While contraception will always remain the primary method of ensuring that all births are wanted ones, abortion is an important secondary method of helping women and couples achieve that goal and should be treated as an integral part of comprehensive women's health care." Sonfield, *supra* note 6, at 9, 30.

27. The White House Council on Women and Girls, *Keeping America's Women Moving Forward: The Key to an Economy Built to Last* 47 (Apr. 2012), *available at* https://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf.

As women have achieved greater success in the classroom, so too have they made greater contributions to the workforce and national economy. Women now comprise nearly 50 percent of the national workforce.[28] A McKinsey & Company study about women's impact on the U.S. economy reported that the increase of women in the workforce since 1970 has accounted for 25 percent of current gross domestic product.[29] Women also own approximately 9 million privately-held businesses.[30] Those businesses directly generate $1.4 trillion in sales, and employ 7.8 million people with a payroll of $249 million.[31] Businesses owned or majority-owned by women also have a significant indirect economic impact on the national economy through increased jobs, spending and manufacturing by other entities. On a combined direct and indirect basis, these businesses owned and majority-owned by women add $2.8 trillion to the economy and generate 23 million jobs.[32]

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28. Executive Office of the President, Council of Economic Advisers, *Women's Participation in Education and the Workforce* 9 (Oct. 14, 2014), *available at* https://www.whitehouse.gov/sites/default/files/docs/womens_slides_final.pdf (showing that women make up 47.9 percent of the national workforce).

29. Joanna Barsh & Lareina Yee, McKinsey & Company, *Unlocking the full potential of women in the US economy* 1 (Apr. 2011), *available at* http://www.mckinsey.com/client_service/organization/latest_thinking/unlocking_the_full_potential ("Barsh & Yee").

30. Nat'l Women's Business Council, *Reasons to Invest in Women Entrepreneurs* 1, *available at* https://www.nwbc.gov/sites/default/files/Why%20Invest%20in%20Women%20Fact%20Sheet.pdf ("*NWBC Reasons to Invest*").

31. *Id.*

32. CWBR, *Economic Impact* at 1, 10.

Not only are women extremely successful running their own businesses, but Fortune 500 companies also benefit from women serving on their Boards of Directors. For instance, companies with at least three women board directors for at least five years "outperformed those with zero [women board directors] by 84% on return on sales (ROS), 60% on return on invested capital (ROIC) and 46% on return on equity (ROE)."[33] Companies with a high number of women board directors "outperformed industry median firms in percent of revenues, assets and stockholder's equity by 1.6 percent."[34] Even though businesses thrive with women's active participation and leadership, women still face an uphill climb in the workforce and are underrepresented at every level in the corporate pipeline.[35] Adding barriers like H.B. 2 that disproportionately affect women will only exacerbate the very real challenges women in business continue to face.

If women are deprived of the tools they have relied upon to effectively time childbirth and family responsibilities, many people, including women themselves,[36] may decide

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33. NWBC, *Reasons to Invest* at 2.

34. *Id.*

35. McKinsey & Company, *Women in the Workplace 2015* 5, 13, *available at* http://womenintheworkplace.com/ui/pdfs/Women_in_the_Workplace_2015.pdf?v=5 (noting that women "are almost three times more likely than men to say they have personally missed out on an assignment, promotion, or raise because of their gender"); *see also* Barsh & Yee, *supra* note 29, at 1 (explaining that "[d]espite the sincere efforts of major corporations, the proportion of women falls quickly as you look higher in the corporate hierarchy" and female participation at senior levels still lags significantly behind men).

36. Barsh & Yee, *supra* note 29, at 4 (explaining that embedded institutional mindsets and embedded individual

it is too risky for women to undertake high-achieving career paths or start businesses. As one veteran business leader reflected:

> Being a parent is one of life's great pleasures, but being a parent without the emotional or financial resources necessary is a source of despair and misery for parent and child alike, a tremendous drain on the economy, and a tragic and unnecessary waste of human potential. I will never forget the despair I felt as a young woman of 21, feeling the womanhood I had dreamed of drain away because I was afraid I was pregnant. If I had been forced to have a child then, I would not have been able to be the kind of parent I wanted to be. I was not psychologically or financially ready. I would not have been able to start my business career in Moscow. I would not have been able to go to business school. I would not have been able to be co-founder and CEO of Juice Software. I would not have been hired by Google in 2004 and had six of the most intensely satisfying professional years of my life. I would not have had the six year old twins whom I adore. I would not have had the opportunity to write the four books I've written. I would not be co-founding another company, Radical Candor.

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mindsets serve to hold women back in their career advancement); *see also* Marianne Bertrand *et al.*, *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors*, 2 Am. Econ. J.: Applied Econ. 228, 230 (July 2010) (finding that "MBA mothers seem to actively choose jobs that are family friendly, and avoid jobs with long hours and greater career advancement possibilities").

> Leading a team of 700 people at Google, and starting a new company, I have had the opportunity to see the vital importance of allowing people to choose when they become parents. I was lucky, I had the resources to make the choices about my reproductive future. Countless other people are not so lucky. They do not have the financial resources to make the reproductive choices appropriate to their circumstances. Putting unnecessary obstacles in the way of simple, cost-effective health services damages everyone. This approach is, to paraphrase Hobbes, nasty, brutish, and short-sighted.[37]

With restrictions on access to abortion services, women's career opportunities will stall instead of expand, with attendant negative consequences for individual women and their families and for the national economy as a whole.

Women who have more control over their reproductive lives are better able to provide for their families. "Many women are the principal wage earners for their families, and they participate in the Social Security system on exactly the same basis as men." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 654, 95 S. Ct. 1225, 1236 (1975) (Powell, J., concurring). In fact, mothers are now the sole or primary income-earners in 40 percent of households with minor children.[38] This represents a major shift in the U.S. economy, with the number of female-headed households

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37. Kim Malone Scott, Owner and Founder of Radical Candor, Inc. and former Google executive.

38. Wang, *supra* note 21, at 1.

having nearly doubled since 1975.[39] This shift is due in part to women's increased control over the timing of motherhood. Women who postpone entry into parenthood until their late 20's or 30's increase their short and long term earning power.[40] In fact, women may see "a 3% increase in weekly wages and a 9% increase in career earnings *for each year of delayed childbearing*, even after accounting for differences in other background characteristics that could affect women's earnings."[41] On the other hand, women who need but cannot get an abortion are "three times more likely to fall into poverty" than women who have meaningful access to abortions.[42] Simply, women who have meaningful access to a full range of reproductive healthcare services, including abortion, can postpone childbirth until they are better positioned to make a greater commitment to their own careers and contribute financially to their families and the national economy.

With the advent of women gaining meaningful access to contraceptives and safe and legal abortions, women were given the freedom to pursue academic and professional

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39. Sarah Jane Glynn, Center for American Progress, *The New Breadwinners: 2010 Update - Rates of Women Supporting Their Families Economically Increased Since 2007* 3 (Apr. 2012), *available at* https://cdn.americanprogress.org/wp-content/uploads/issues/2012/04/pdf/breadwinners.pdf.

40. Sonfield, *supra* note 6, at 16.

41. Kaye, *supra* note 8, at 30 (emphasis in original); NWLC, *Reproductive Health* (finding that "having a child creates both an immediate decrease in women's earnings and a long-term drop in their lifetime earning trajectory").

42. Gupta, *supra* note 22.

pursuits, and as a result their contributions to our national economy have been sizeable over the last several decades. H.B. 2 jeopardizes those contributions. If permitted to stand, H.B. 2 will have wide-reaching negative economic consequences because other states could articulate hollow rationales for infringing on women's fundamental right to abortion and thereby severely restrict women's ability to control whether and when to have children, just like Texas has. Recognizing this, one leading entrepreneur said:

> Reproductive-age women need reliable, straight forward access to the full range of reproductive health services. It's that simple. To restrict women's access to legal, medically appropriate services under false pretenses as Texas has done is unfair, burdensome, and discriminatory.[43]

II. Businesses and the National Economy Suffer When Working Women Lack Meaningful Access To Abortion Services.

Employee well-being is essential to businesses' economic success, and for women, a vital part of well-being involves having control over their reproductive health.[44] Limiting access to abortion providers and services, as H.B. 2 does, will increase employee absences and reduce

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43. Linden Rhoads, General Manager of the W Fund and General Manager of Seattle Ventures.

44. One study of European women suggests "that allowing abortion and oral contraceptives increased women's self-reported life satisfaction." *See* Matthias Doepke *et al.*, Nat'l Bureau of Economic Research Working Paper 17672, *The Economics and Politics of Women's Rights* 21 (Dec. 2011).

women's well-being by increasing stress.[45] These in turn will have a tangible negative effect on businesses' net income and the national economy.

A. House Bill 2 Will Increase Employee Absences and Cause Women to Incur Unnecessary Expenses They Cannot Afford.

If the Fifth Circuit's decision is upheld, Texas will be left with only 10 abortion providers to serve the needs of more than 5.4 million female residents of childbearing age in the state.[46] Those remaining clinics are overwhelmingly concentrated around Texas's larger metropolitan areas of Dallas-Ft. Worth, Houston and San Antonio.[47] As a result, women who live and work in rural parts of Texas will face "longer travel distances (in some cases exceeding 500 miles)..." *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 683 (W.D. Tex. 2014), *aff'd in part, vacated in part, rev'd in part sub nom. Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) *modified*, 790

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45. Laura F. Harris *et al.*, BMC Women's Health, *Perceived stress and emotional support among women who are denied or receive abortions in the United States: a prospective cohort study* 6 (2014), *available at* http://bmcwomenshealth.biomedcentral.com/articles/10.1186/1472-6874-14-76 (finding that "women who were denied abortions experienced higher stress compared with women who received abortions, and [ ] women who received later abortions had higher stress initially than women receiving first trimester abortions").

46. Guttmacher Inst., *State Facts About Abortion: Texas*, *available at* https://www.guttmacher.org/pubs/sfaa/pdf/texas.pdf.

47. Becca Aaronson, *Map: Find Texas' Remaining Abortion Facilities*, The Texas Tribune (July 2, 2015), *available at* http://www.texastribune.org/2015/07/02/map-texas-abortion-facilities/.

F.3d 598 (5th Cir. 2015) and *cert. granted,* 136 S. Ct. 499 (2015). Those longer travel distances will require women and their companions[48] to miss work and incur previously unnecessary travel-related expenses.[49] This in turn will cause many businesses to suffer economic losses associated with the increased absences. Importantly, these additional burdens will disproportionately affect "poor and low-wage workers who have little control over their work schedules[50] and little ability to absorb extra costs."[51]

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48. Stephanie L. Van. Bebber *et al.*, *Patient Costs For Medication Abortion: Results From a Study of Five Clinical Practices*, 16 Women's Health Issues 4, 7 (2006) (finding that "[t]wo-thirds of women reported having at least 1 person accompany them to the abortion appointment and many reported having multiple companions with them").

49. NWLC, *Reproductive Health.*

50. Approximately 48 percent of workers do not have paid sick days. Jodie Levin-Epstein, Center for Law and Social Policy, *Getting Punched: The Job and Family Clock: It's Time for Flexible Work for Workers of All Wages* 5 (July 2006), *available at* http://www.clasp.org/resources-and-publications/files/0303.pdf; *see also* Appelbaum, *supra* note 4, at 19 (reporting that, "many U.S. workers are subject to disciplinary action for even asking about schedule flexibility or predictability.. "); Susan J. Lambert *et al.*, *Schedule flexibility in hourly jobs: unanticipated consequences and promising directions*, 15(3) Community, Work & Family 293, 306 (2012) (explaining that many hourly workers cannot take time off unless they find co-workers to cover their shifts); *Women's Health Care Chartbook* at 32 (finding that 18 percent of women delayed seeking, or did not receive, necessary healthcare because they were unable to coordinate time off from their jobs, and another 23 percent of women stated that lack of time prevented them from receiving medical attention in a timely manner).

51. NWLC, *Reproductive Health; see* Brief for National Women's Law Center as *Amici Curiae* in Support of Petitioners,

Additionally, small businesses are disproportionately impacted when employees are absent. Because "they have a smaller pool of workers from which to draw when an employee is out of the office or not working at full capacity for health reasons, small firms are more vulnerable than large firms to health-induced changes in worker absenteeism and productivity."[52] Given that 89 percent of businesses have fewer than 20 employees, and those businesses account for 18 percent of private sector employment,[53] abortion-related absences would have a significant impact on these businesses as well as the economy as a whole.

B. Ensuring Employee Well-Being Increases Productivity and Minimizes Economic Losses.

When employees' well-being is compromised, businesses suffer concrete economic losses related to, among other things: (i) reduced productivity and presenteeism;[54] (ii) absenteeism; and (iii) high rates of

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Whole Woman's Health, et al. v. Kirk Cole, M.D., No. 15-274 (discussing the burden that H.B. 2 places on women in low-wage jobs in greater detail).

52. Executive Office of the President, Council of Economic Advisers, *The Economic Effects of Health Care Reform on Small Businesses and Their Employees* 14 (July 25, 2009), *available at* https://www.whitehouse.gov/assets/documents/CEA-smallbusiness-july24.pdf.

53. *Id.* at 1 (explaining that "the vast majority of firms in the United States are small, and these firms account for a substantial share of private sector employment").

54. Presenteeism refers to employees who are physically present at work, but too stressed or ill to be effective. Amy Richman

employee turnover.[55] Such factors can cost businesses up to $300 billion annually.[56] Calculated another way, a single employee who faces health issues can cause a business to incur "an estimated cost of 16 days of [incidental] sick leave and [loss of] $8,000 . per year."[57] Health-related loss of productive time, in particular, results in annual losses to businesses of approximately $226 billion.[58]

Stress is also a leading cause of employee turnover, which costs employers between 12 and 40 percent of

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et al., Corporate Voices for Working Families, *Business Impacts of Flexibility: An Imperative for Expansion* 13 (Feb. 2011), *available at* https://www.wfd.com/PDFS/BusinessImpactsofFlexibility_March2011.pdf.

55. *Id.* (finding that stress is responsible for 40 percent of turnover).

56. *Id.* (estimating stress-related costs to be around $300 billion per year); David Lee, *Managing Employee Stress and Safety: A Guide to Minimizing Stress-Related Cost While Maximizing Employee Productivity* 3 (2000), *available at* https://www.memic.com/Portals/0/docs/Safety/ManagingStress.pdf (estimating stress-related costs to be between $50 billion and $150 billion each year).

57. *Id.*

58. Sean Nicholson *et al.*, *How to Present the Business Case for Healthcare Quality to Employers* 12 (Nov. 2005), *available at* http://knowledge.wharton.upenn.edu/wp-content/uploads/2013/09/1303.pdf (estimating that "costs of impaired on-the-job productivity are larger than the costs associated with absences"); Lindsay E. Sears *et al.*, *Overall Well-Being as a Predictor of Health Care, Productivity and Retention Outcomes in a Large Employer*, 16(6) Population Health Management 397, 397 (2013).

their companies' net earnings each year.[59] To replace a departing worker, businesses expend 21 percent of the departing worker's salary, which equates to a $3,700 median annual turnover cost per departing worker.[60] It is "costly to replace workers because of the productivity losses when someone leaves a job, the costs of hiring and training a new employee, and the slower productivity until the new employee gets up to speed in their new job."[61]

As set forth above, working women's well-being is tied to their ability to effectively manage their reproductive health and determine whether and when to have children. When they incur previously-unnecessary absences and expenses to travel extra distances for abortions,[62] women not only decrease their own net earnings, but such additional absences also negatively affect their employers. Similarly, if restricted access to abortion providers causes

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59. *Id.*

60. Heather Boushey & Sarah Jane Glynn, Center for American Progress, *There Are Significant Business Costs to Replacing Employees* 1 (Nov. 16, 2012), *available at* https://cdn.americanprogress.org/wp-content/uploads/2012/11/16084443/CostofTurnover0815.pdf (calculating the cost of turnover for all positions except executives and physicians) ("Boushey & Glynn"); Nicholson, *supra* note 58, at 9 (finding that a "program that improves workers' health could lower the turnover rate by creating a stronger attachment between the employees and the company").

61. Boushey & Glynn, *supra* note 60, at 1.

62. *See* Brief for National Abortion Federation and Abortion Providers as *Amici Curiae* in Support of Petitioners, *Whole Woman's Health, et al. v. Kirk Cole, M.D.*, No. 15-274 (recounting personal challenges women have faced due to the restrictions of H.B. 2).

women to carry unwanted pregnancies to term,[63] or if women suffer added abortion-related stress, businesses suffer. Indeed, with decreased access to abortions, it is likely that existing employee turnover rates will increase as affected women seek less burdensome employment or leave the workforce altogether to raise those children.

C. Business Executives Encourage Employee Well-Being, Which Directly Impacts Financial Success.

Employers recognize that reducing employee stress, and increasing overall well-being can result in positive financial gains. For example, "79% of CFOs [Chief Financial Officers] believe that workforce productivity [caused by improved health] has a great or critical effect on their financial performance drivers."[64] Simply, "CFOs

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63. In an analogous situation where state regulations restricted Medicaid recipients' access to abortions, 25 percent of women seeking Medicaid-funded abortions were forced to carry unwanted pregnancies to term. Rebecca Wind, *News Release: Restricting Medicaid Funding for Abortion Forces One in Four Poor Women to Carry Unwanted Pregnancies to Term*, Guttmacher Inst. (July 8, 2009), *available at* http://www.guttmacher.org/media/nr/2009/07/08/ (stating that "[a]pproximately one-fourth of women who would obtain a Medicaid-funded abortion if given the option are instead forced to carry their pregnancy to term when state laws restrict Medicaid funding for abortion, because they lack money to pay for the procedure themselves").

64. Integrated Benefits Institute, *How CFOs View Investments in Health & Productivity: On The Brink of Change* Executive Summary (Dec. 2002), *available at* https://www.acoem.org/uploadedFiles/Career_Development/Tools_for_

recognize a strong link between health, productivity and corporate financial success."[65] A critical component of well-being includes patient autonomy and choice of healthcare. As one business owner observed:

> Our employees' health choices are their own, and a successful company should make all options available to them. As employers, we don't want our company, the state, or our country, to be a place that limits health care choices.[66]

To capitalize on the relationship between employees' well-being and businesses' financial interests, many companies have implemented various work-life initiatives. One oft-cited example involves the recent and growing trend of providing on-site healthcare clinics. By providing employees with convenient access to healthcare services, companies benefit overall because their employees incur between 15 and 22 fewer incidental missed workdays than the employees of a company that lacks on-site healthcare providers.[67] This is nearly one extra month of productivity

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Occ_Health_Professional/Health_and_Productivity/How%20CFOs%20View%20Investment%20in%20Health%20and%20Productivity%20On%20the%20Brink%20of%20Change.pdf.

65. *Id.* at 1, 4 (reporting that "[s]ix respondents in 10 ascribe a strong linkage of health to productivity to the bottom line (with an additional one-third recognizing a moderate link)").

66. Stelios Valavanis, Founder and President of onShore Networks.

67. Matt Dunning, *On-Site Health Services Can Reduce Employee Absence, Comp Costs,* Business Insurance (Oct. 16, 2015), *available at* http://www.businessinsurance.com/

per employee. Minimizing employees' logistical and travel requirements increases productivity. H.B. 2 does the opposite.

Women have been able, and continue, to contribute to the national economy because, in large part, they can control the timing of their entry into parenthood or refrain from it altogether if they so choose. Recognizing that women's ability to participate "equally in the economic and social life of the Nation" was "facilitated by their ability to control their reproductive lives," this Court should not reverse the course of the substantial economic progress women have made. *See Casey*, 505 U.S. at 856, 112 S. Ct. at 2809 (citations omitted).

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article/20151016/NEWS03/151019864/national-business-group-on-health-study-says-on-site-health-services (reporting that "employers that offer on-site clinical services to their entire employee population reported an average incidental rate of five lost workdays per employee per year, compared with rates as high as 27 lost workdays among employers that offer minimal or no access to onsite clinics").

CONCLUSION

The United States economy is robust and best served when women can participate fully in the workforce. Texas House Bill 2 threatens businesses and the national economy by imposing restrictions that will reduce women's ability to control whether and when to have children, which in turn will limit their ability to contribute to the financial strength of this nation. For these, and the foregoing reasons, *amici curiae* respectfully urge this Court to reverse the Fifth Circuit Court of Appeal's June 9, 2015 opinion, and find that H.B. 2 unduly burdens women's fundamental right to abortion.

Respectfully submitted,

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APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

Alexandra Loeb spent many years in executive positions at Microsoft Corporation, including serving as a Corporate Vice President. Currently, Ms. Loeb is a board member of several nonprofits.

Linden Rhoads is currently General Manager of the W Fund, investing in technology-based start-up companies, having spent many years working as a start-up executive herself. Ms. Rhoads is also General Manager of Seattle Ventures.

Kim Malone Scott is the Owner and Founder of Radical Candor, Inc. Ms. Scott was inspired to start Radical Candor based on her experience as an executive at Google and as an advisor at several well-known technology companies.

Stelios Valavanis is Founder and President of onShore Networks, a leading provider of computer network management services. Prior to founding onShore, Mr. Valavanis held a number of technical positions at the University of Chicago.

Romalda Allsup is Co-Founder and Owner of Terra Toys, a premier toy store carrying toys from vendors throughout the world. The store, located in Austin, Texas, is the largest privately owned toy store in the world.

Maryam Banikarim is the Global Chief Marketing Officer at Hyatt Hotels and former Senior Vice President and Chief Marketing Officer at Gannett, the largest U.S. newspaper publisher.

Appendix

Donald Barbieri is the Retired Chairman and Chief Executive Officer of Red Lion Hotels Corporation, a position he held for nearly 25 years. Mr. Barbieri currently serves as a Member of the Board of Regents at Washington State University.

Jacqueline L. Beamer is the Founder and Owner of the brand enhancement agency BrandQuery, LLC. Ms. Beamer has more than 30 years of experience in working with major household brands.

Marianne Bertrand is an economics professor at the University of Chicago Booth School of Business. Professor Bertrand's research covers the fields of labor economics, corporate finance, and development economics.

Garrett Boone is the Retired Chairman/Chief Executive Officer and Co-Founder of The Container Store, headquartered in Texas. Mr. Boone is also Co-Founder of the nonprofit Texas Business for Clean Air.

Francoise Brougher has served in executive positions in a variety of industries, most recently working for several major technology companies. Through her prominent positions at these companies, Ms. Brougher has managed large, global teams of employees.

Lisa Brummel is a Retired Executive Vice President of Human Resources of a major technology company. Prior to that position, she served in a number of management and marketing roles at that corporation. Ms. Brummel is currently Co-Owner of the Seattle Storm a WNBA basketball team.

Appendix

Marilyn Burgess is the current Chief Financial Officer of The Fastener Connection, Inc. Formerly a Certified Public Account, Ms. Burgess also served with the North Houston Greenspoint Chamber of Commerce and the Texas Parent Teacher Association.

Billy Joe Cane has more than 20 years of experience producing, designing and contributing to more than 200 video games. Mr. Cane has worked with Austin-based studios Sneaky Games, Critical Mass Interactive and Origin Systems, Inc.

Laurits R. Christensen is Chairman and Co-Founder of Laurits R. Christensen Associates, Inc., a full-service, applied economics consulting firm. Mr. Christensen is also an economics professor at the University of Wisconsin-Madison where he has taught for over 20 years.

Michael H. Clark is the President of Interflote-USA LLC, a position he has held for more than 20 years. Interflote, based in Texas, supplies equipment and expertise to the fuel and energy industry across the globe.

Paul K. Doak is the Owner of ID Financial, LLC, a financial planning firm located in Seattle, Washington. Mr. Doak is a Certified Financial Planner and has been working with clients on developing their financial strategies for almost two decades.

Appendix

Judith Duke is the Owner of Duke OCM Solutions, a Dallas-based independent consulting firm. Ms. Duke has served in management roles for some of the largest consulting firms, and her client list includes Fortune 100 companies.

Pam Edstrom is the Co-Founder of WE, a Seattle-based public relations firm with several Fortune 500 clients. Prior to founding WE, Ms. Edstrom worked in public relations at a large corporation.

Jonathan Fairbanks is a Partner and Co-Founder of Houston-based Global Energy Capital. Prior to forming GEC, Mr. Fairbanks served as Founder and Director of several public energy companies.

Lee Fikes is the Chief Executive Officer of Bonanza Oil, based in Dallas, Texas. Mr. Fikes is also a well-known philanthropist and Founder of the Leland Fikes Foundation.

Sonia Gardner is the Co-Founder, President and Managing Partner of Avenue Capital Group, a global investment firm with approximately 200 employees. Ms. Gardner was the recipient of the 100 Women in Hedge Funds' 2008 Industry Leadership Award.

Karen Glover is Retired Firm Managing Partner at Preston Gates & Ellis LLP. Ms. Glover has also served on numerous for-profit, nonprofit and government boards.

Appendix

Andrea Chilton Greer is the Founder of Andrea Greer Consulting, a Texas-based firm that consults with nonprofits to increase fundraising effectiveness. Prior to starting her own business, Ms. Greer worked as the Vice President of Development & Marketing for the Houston Area Women's Center.

Kenneth J. Heymann is the Chief Operating Officer of UniFocus, one of the largest performance management firms in the service sector. Mr. Heymann was also Founder and President of Heymann Group, Inc., a consulting, software and asset advisory company.

Ruth Ann Harnisch is the Founder of The Harnisch Foundation, which provides grants to leaders and communities working to advance gender and racial equality and diversity, with a focus on women and girls. Before establishing the Foundation, Ms. Harnisch worked in the media industry.

Monica Harrington has served as Chief Marketing Officer at technology start-ups Valve and Picnik. Prior to working with these companies, Ms. Harrington served in executive positions at Microsoft Corporation.

Sheila Hollender is the Co-Founder of Seventh Generation, a producer and distributor of environmentally safe household products. Ms. Hollender is currently the Co-Founder and President of Sustain Health Enterprises.

Janice Huseby is a former corporate executive and a founding member of the Washington Business Alliance. The Alliance is a statewide business organization that works to solve the state's most critical issues.

Trish Karter is the Co-Founder and Chairman *Emeritus*, Dancing Deer Baking Company, Inc., a producer of high-end, natural baked goods for nationwide distribution, headquartered in Boston. Ms. Karter also does advisory work in the Consumer Packaged Food Products industry.

Jill Lafer is the Co-Owner and CEO of Hoffman/Lafer Assoc. LLC, a licensing firm. Ms. Lafer sits on several major boards including The New York City Opera and The Children's Museum of Manhattan among others.

Elisabeth Lanier is Co-Owner of DesignWorks, a professional fine arts and fine crafts gallery in Galveston, Texas.

Ken Lehman is the Managing Director of KKP Group LLC, located in Evanston, Illinois. Mr. Lehman previously worked as Co-Chair of Fel-Pro, Inc., a family owned and managed automotive component part manufacturer.

Michael LeRoy is a tenured professor at University of Illinois Urbana-Champaign School of Labor & Employment and the College of Law.

David Lubar is President & CEO of Lubar & Co., a Milwaukee-based family office with over 40 years of experience acquiring and building private, middle-market operating businesses.

Sheldon Lubar is Chairman of Lubar & Co., a Milwaukee-based developer with over 40 years of experience acquiring and building private, middle-market operating businesses.

Susan McPherson is the Founder and Owner of McPherson Strategies, a communication firm based in New York, focused on the intersection of brands and social good. Ms. McPherson has more than 25 years of experience in marketing and public relations. She also invests in and advises technology start-ups.

Ronelle J. Melekai is the Owner of Ronelle J. Armstrong Consulting Services, a sole proprietorship in Washington serving clients through out the U.S. Ms. Melekai has more than 25 years of experience as an accountant, software implementer, and account manager.

Melinda Moulton is the Chief Executive Officer of Main Street Landing, an environmentally and socially conscious redevelopment firm located in Burlington, Vermont. Ms. Moulton has served on the boards of numerous nonprofit organizations, and has been honored for her work by the Burlington Business Association.

Marie Osadjan is the Retired Managing Counsel of BP America Inc., a position she held for more than 25 years. In that position, Ms. Osadjan was responsible for supporting two major Midwest refineries.

Emily Oster is an Associate Professor of Economics at Brown University. Professor Oster's research has covered a wide range of topics, including health economics.

Ann Paris is the Owner of Paris Insurance Services located in Bellevue, Washington. Ms. Paris has more than 25 years of experience as an agent and broker, and previously worked for a large insurance company.

Phoebe M. Pollinger is the former Senior Vice President of Greenwich Capital Markets and Chief Operating Officer of its wholly-owned subsidiary, Franchise Mortgage Acceptance Corp.

Jane Praeger is the Founder and President of Ovid, Inc., a strategic communications firm that specializes in speech, presentation, and media training. Ms. Praeger has worked with corporations, nonprofits and individual business leaders in a variety of industries.

Susan Pritzker is a Co-Founder of the Libra Foundation and former Chair of the Board of Directors for the Chicago Foundation for Women.

Marvo Reguindin is the President of Thinking Cap Communications and Design, Inc., a full service advertising and graphic design agency. Thinking Cap's clients include both nonprofit and for-profit businesses across the country.

Yael Sahar is the Owner of Yael Sahar Inc., a design studio based in New York and specializing in branding, user experience and graphic design. Ms. Sahar has years of experience leading teams of designers, animators and programmers.

Tim Schwertfeger is the Retired Chairman of Nuveen Investments headquartered in Chicago. Nuveen works with individuals, corporations, endowments and foundations, investing in markets across the globe.

Jade Chang Sheppard is the Owner of Gideon USA, a Texas-based contracting company. Ms. Sheppard grew Gideon into a multi-million-dollar company responsible for construction, renovation and repair of federal government facilities.

Betty Spence is the current President of the National Foundation for Female Executives. The organization provides resources to executives, professionals and business owners in an effort to advance women in business.

Barkley Stuart is the Executive Vice President of Glazer's Inc., a Dallas-based sales and marketing organization in the wholesale beverage alcohol distribution industry.

K. Sujata is the President and Chief Executive Officer of Chicago Foundation for Women. Sujata has experience at several notable nonprofits, as well as working as a scientist and engineer in several manufacturing industries.

Dennis Tardan is the Owner of Dennis Tarden Communication Consulting, a communication training and coaching firm headquartered in Austin, Texas. As a communication consultant and coach, Mr. Tarden works with executives, managers and teams to deliver their core messages.

Nina Tarr is Professor Emeritus at the University of Illinois College of Law. As a professor, Tarr taught a variety of courses, including family law, and served as the Director of Clinical Education.

Patricia Throop is Founder and Owner of ElderCare Consulting, LLC, an elite concierge service assisting seniors through a variety of services. Ms. Throop is also an active board member of several local business organizations.

Dawn Trudeau is a former General Manager at a large technology company. Currently, Ms. Trudeau serves on the board of several nonprofit organizations and is Co-Owner of the WNBA's Seattle Storm.

Deborah Uri is Co-founder of Ruby Ribbon, Inc., a social commerce apparel company, and former executive at Squarespace and Yahoo!, as well as Advisor to numerous Fortune 500 brands.

William A. Von Hoene, Jr. is the Senior Executive Vice President and Chief Strategy Officer of Exelon Corp. Mr. Von Hoene has held a number of Executive positions since he joined the corporation in 2002.

Wayne W. Zachary, Ph.D. is the Chief Executive Officer of Starship Health Technologies, LLC, a company dedicated to solving many challenges of the modern healthcare system. Dr. Zachary is also an internationally recognized technology pioneer.

Appendix

Andrea Zopp is a Civic Leader and former President and Chief Executive Officer of Chicago Urban League. Ms. Zopp was also the Executive Vice President, Chief of Human Resources and General Counsel at the Exelon Corporation. Prior to joining Exelon, Zopp was Senior Vice President, General Counsel and Corporate Secretary of Sears Holdings Corporation.